No. 00-191

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE MISSOURI REPUBLICAN PARTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the government carry its burden of demonstrating that limits on the amount of financial support provided by political parties to their candidates are closely drawn to prevent corruption or the appearance of corruption?

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INTEREST OF THE *AMICUS CURIAE*

Amicus Missouri Republican Party (MRP) is a political party committee organized under Missouri law. The MRP's primary goals are to take control of state government by electing Republican candidates to statewide office and to the state legislature and, in turn, to implement Republican policies and principles. The party's fate is inextricably tied to its candidates. The MRP, like other political parties, can give effect to its views "only by selecting and supporting candidates." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (*Colorado I*).

Missouri imposes "contribution" limits on the amount of financial support that political parties can provide their candidates. These limits substantially interfere with the MRP's ability to recruit candidates, to provide seed money to its candidates, and to "target" its financial support on particular races critical to its goal of taking control of state government. The MRP believes that consideration of these state law limits on political party "contributions" will put the federal limits on coordinated expenditures in sharper focus, and the *amicus* accordingly submits this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. The MRP, like all political parties, "targets" its financial support to candidates who have a chance of winning races that will help the party capture control of the legislature and

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1. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

the executive branch. Targeting party support is critically important. In the Missouri 1996 general elections, for example, a switch of about 3,000 votes in key legislative districts would have permitted the MRP to take control of the state legislature for the first time since 1948. Similarly, in the 2000 elections, the MRP was only six seats away from controlling the state house and only two seats away from controlling the state senate, and the party targeted its financial support on three to five senate races and some twenty house races.

2. A political party's financial support for its candidates can, in theory, include independent expenditures, coordinated expenditures, and simple contributions.

a. An independent expenditure is one made by a political party without any consultation or coordination with its candidate.

b. A coordinated expenditure is one made by a political party in consultation and coordination with its candidate. A political party makes cash coordinated expenditures either by purchasing goods and services for its candidate or by contributing party funds to its candidate to purchase these goods and services. A political party makes non-cash coordinated expenditures by providing goods (*e.g.*, a mailing list) and services (*e.g.*, campaign advice) to its candidate.

c. A simple contribution is financial support provided to a candidate without any conditions, explicit or implicit, on the use of the funds by the candidate.

3. Like most political parties, the MRP makes independent expenditures and coordinated expenditures, and it does not make simple contributions.

a. The MRP believes that coordinated expenditures are the most effective way to achieve its goals. Coordinated expenditures, unlike either independent expenditures or simple contributions, allow the party and the candidate to

plan the campaign together and to coordinate their message. After the MRP and its candidate consult, the party either purchases goods and services for its candidate or contributes party funds to its candidate to purchase these goods and services. Although some may label the party support an "expenditure" in one case and a "contribution" in the other case, the use of the party's funds is the same. In each case the MRP provides financial support to its candidates to achieve the party's goal of taking control of government.

b. The MRP does not make simple "contributions" to candidates. In order to achieve its goal of taking control of government, the party always controls, explicitly or implicitly, the use of its funds. The MRP provides financial support for Republican candidates only after consultation with the candidate and the candidate's committee and in cooperation with the candidate and the candidate committee. It provides this support with the expectation and understanding that its candidates will use the party's resources to promote the ideas of the Republican party and for the party's purpose of taking control of government. Although candidates may view party support as a "contribution" to their campaigns, the party spends its funds only to achieve the party's ends.

c. The MRP makes independent expenditures, as opposed to coordinated expenditures, only because Missouri law limits the amount of cash and in-kind support that political parties can provide their candidates. An independent expenditure – the expenditure of party money on behalf of the party's candidate without the knowledge of the candidate – artificially separates the party and its candidate. Independent expenditures are not as effective as coordinated expenditures. For example, when state law limits on coordinated support force the MRP to make an independent expenditure, the party cannot discuss with its legislative candidate the best approach to voters in the candidate's district, the best timing for campaign messages, the set of

voters, like senior citizens, who may be critical to the success of the campaign, or other important matters.

4. Missouri law limits, as "contributions," the amount of both cash and in-kind support provided by political parties to their candidates.[2] Although Missouri does not limit the amount of independent expenditures made by a political party, the slightest degree of cooperation and coordination between a political party and its candidates makes the party's support a "contribution" subject to the state law limits. *See* Missouri Ethics Commission, Opinion No. 00.05.100—1 (May 15, 2000)

5. Missouri's "contribution" limits prevent the MRP from targeting its financial support to candidates whose success is necessary to achieve the party's goal of taking control of government: in every targeted race from 1988 to 1998 (with the exception of 1996 when the limits were in effect), the MRP's support for its targeted candidates far exceeded the state law limits. These "contribution" limits also (1) reduce the number of candidates in primary elections and reduce spending in primary and general elections, (2) interfere with the MRP's ability to use primaries to field its best candidates, (3) prevent the MRP from providing seed money necessary to recruit candidates, and (4) force the MRP to support its

2. The statute limits "the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee" to elect an individual to: $10,000 for the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general; $5,000 for the office of state senator; $2,500 for the office of state representative; and "[t]o elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought." Mo. Rev. Stat. § 130.032.4 (Supp. 1999). In an unopposed primary election, the maximum "contribution" made by a political party is one-half the otherwise applicable limit. *Id.* Each even-numbered year these "contribution" limits "shall be increased" to take inflation into account and "rounded to the nearest twenty-five-dollar amount." *Id.* § 130.032.2

candidates by independent expenditures that are not as effective as coordinated expenditures. These burdens on the MRP have a systemwide effect precisely because the goals of the party are systemwide – to take control of state government and to implement the party's policies on a systemwide (statewide) basis.

6. The Court of Appeals for the Eighth Circuit held that Missouri statutes limiting the amount of cash and in-kind "contributions" made by political parties to their candidates violate the First Amendment. *Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir.), *application for stay denied sub nom. Nixon v. Missouri Republican Party* (No. 00-A241), 121 S. Ct. 31 (2000). Missouri has stated an intention to seek review of the Eighth Circuit's judgment.

SUMMARY OF ARGUMENT

Political parties speak through their candidates. Limits on the amount of financial support provided by political parties to their candidates – whether that support is labeled a "coordinated expenditure" or a "contribution" – impose substantial burdens on the parties' speech. These limits prevent political parties, like the Missouri Republican Party, from targeting financial support to candidates whose success is necessary for them to capture control of government and, in turn, to implement their policies.

To justify these burdens on political speech, there must be some "real problem" or some "real harm." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888, 1891, 1893 (2000). The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 907 (2000), and the government "must present more than anecdote and supposition." *Playboy Entertainment Group*, 120 S. Ct. at 1891. Thus, under *Nixon*, the government must demonstrate that individual contributions cause corruption or the appearance of corruption and that limits

on individual contributions are "closely drawn" to prevent these harms. *See Nixon,* 120 S. Ct. at 904.

Although limits on the amount of financial support provided by political parties to their candidates impose greater burdens on political speech than limits on individual contributions, the Tenth Circuit applied the *Nixon* standard to the federal limits on coordinated expenditures. Even under this deferential standard, these limits violate the First Amendment. The Tenth Circuit held correctly that the government had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1233 (10th Cir. 2000) (footnote omitted). Moreover, given provisions that already address the risk that individuals may attempt to circumvent limits on their contributions by using political parties as conduits, the Tenth Circuit also held correctly that limits on the amount of financial support provided by political parties are not "closely drawn" to enforcing limits on an individual's own contributions. *Id.* at 1232-33.

A recent decision of the Eighth Circuit completely supports the Tenth Circuit's judgment. The Eighth Circuit, which also applied the deferential *Nixon* standard, held that state law limits on political party "contributions" violate the First Amendment because "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." *Lamb*, 227 F.3d at 1073.

ARGUMENT

I. THERE IS NO CONSTITUTIONALLY SIGNIFICANT DIFFERENCE BETWEEN CASH "CONTRIBUTED" BY POLITICAL PARTIES TO THEIR CANDIDATES AND CASH "SPENT" BY POLITICAL PARTIES FOR THEIR CANDIDATES

In *Colorado I*, the Court held that limits on "independent expenditures"[3] by political parties in national elections are unconstitutional. 518 U.S. 604 (1996). Four members of the Court would also have held that limits on "coordinated expenditures" made by a political party in support of its candidates violate the First Amendment.[4]

3. An expenditure made by a political party and that is not coordinated with a candidate or the candidate's campaign is an "independent" expenditure. 518 U.S. at 610 (Breyer, J., O'Connor, J., & Souter, J.).

4. Justice Kennedy, joined by The Chief Justice and Justice Scalia, supported this broader holding. 518 U.S. at 626 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part). Justice Thomas, also joined by the Chief Justice and Justice Scalia, supported this broader holding. 518 U.S. at 630 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part).

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, began his analysis of coordinated expenditures by noting the "central holding" of *Buckley v. Valeo*, 424 U.S. 1 (1976), "that spending money on one's own speech must be permitted . . . and this is what political parties do" when they make expenditures on behalf of their candidates. 518 U.S. at 627. As Justice Kennedy found

> We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election.

Id. at 630. Thus, Justice Kennedy would have held that "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee" that are protected by First Amendment. *Id.*

(Cont'd)

These two categories – independent expenditures and coordinated expenditures – encompass the full range of a party's support for its candidates. Political parties, like the MRP, do not make simple contributions to their candidates. As Justice Kennedy recognized, "in most cases" a "party's spending is made in cooperation, consultation, or concert with its candidate." *Colorado I*, 518 U.S. at 629 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (internal quotation marks omitted). This cooperation and coordination is hardly surprising. The MRP, for example, believes that expenditures coordinated with its candidates are the most effective way to achieve the party's goals. Similarly, as the district court below held "[c]oordinated expenditures," unlike either independent expenditures or simple contributions, "provide the candidate and the party the optimum opportunity to communicate their message." *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1210 (D. Colo. 1999).

Some coordinated expenditures, nonetheless, may well be "virtually indistinguishable from simple contributions."[5] *Colorado I*, 518 U.S. at 624 (Breyer, J., O'Connor, J., & Souter, J.). Consider, as Justice Breyer has suggested, two alternative ways that a political party, in consultation and cooperation with its candidate, might decide to pay its candidate's media bills – "a donation of money" or "direct payment of a candidate's media bills." *Id.*

(Cont'd)
Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, offered a different, and equally compelling explanation why limits on coordinated expenditures violate the First Amendment. *Id.* at 644-48. Justice Thomas expressly found that the "anticorruption rationale" for campaign contribution limits "loses its force" if it is "[a]pplied in the specific context of campaign funding by political parties." *Id.* at 646 (citations omitted); *see id.* ("*What* could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.").

5. Justice Breyer also noted that "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of contribution limits." 518 U.S. at 618.

The MRP, for example, could make a payment of $133,500 to its candidate for state auditor to purchase television time for a specific advertisement as discussed by the party with its candidate, or the party could make a direct payment of the same sum to television stations to purchase television time for the same advertisement. The first alternative – the MRP's "donation" or payment to its candidate – could easily be labeled a "contribution", and the second alternative – the party's "direct payment" of its candidate's media bills – could easily be labeled an "expenditure." Any distinction, however, between (1) passing the party's funds through a candidate's campaign committee to purchase television time and (2) purchasing television time directly for the same advertisement elevates form over substance.[6]

6. The Eighth Circuit held that cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *Lamb*, 213 F.3d 1071. The Court relied on the candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit." *Id.* There is, however, no real difference between a "contribution" of party funds to purchase campaign goods and services and a direct party "expenditure" to purchase the same goods and services. The MRP makes cash payments to its candidates for specific purposes determined by the party in consultation and cooperation with its candidates and their committees. Although candidates theoretically could spend the party's funds as they "see fit" because their committees have physical custody of the party's funds, the MRP has no need to make a contract with its candidates in order to ensure that the party's funds are spent as discussed and to achieve the party's goal of taking control of state government. The MRP, in short, can trust its candidates to use the party's funds as the candidate and the party have discussed.

There is no difference – much less a constitutionally significant difference – between cash "contributions" made by a political party in cooperation with its candidates and cash "expenditures" made by a political party in cooperation with its candidates.[7] As the Court has held, labels are not dispositive. *Colorado I*, 518 U.S. at 621-22 (Breyer, J., O'Connor, J., & Souter, J.) (FEC's characterization of party spending "cannot help the Government prove its case"; "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one"); *id.* at 627 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) ("as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis). Moreover, as the Tenth Circuit recognized correctly, "a simple cubbyholing of constitutional values under the labels 'contribution' and 'expenditure' cheapens the currency." *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1232 (10th Cir. 2000) (*Colorado Republican*).

II. LIMITS ON CASH "SPENT" BY POLITICAL PARTIES FOR THEIR CANDIDATES, AS WELL AS LIMITS ON POLITICAL PARTY "CONTRIBUTIONS", IMPOSE SUBSTANTIAL BURDENS ON POLITICAL SPEECH

Although some coordinated expenditures by political parties – donations or payments to its candidates – may be "virtually indistinguishable from simple contributions", a political party's financial support for its candidates is not the

7. The Federal Election Campaign Act confirms the fundamental point that political party expenditures and contributions are indistinguishable. As Justice Breyer noted in *Colorado I*, federal law treats contributions as the equivalent of expenditures: the FECA regulates political party *expenditures* in support of its candidates as an exception to otherwise applicable *contribution* limits. *See* 518 U.S. at 610-12 (Breyer, J., O'Connor, J., & Souter, J.).

same thing as a "contribution" made by an individual or a political action committee (PAC). A political party's spending "bears little resemblance to the contributions discussed in *Buckley* [424 U.S. 1 (1976)]." *Colorado I*, 518 U.S. at 629 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part); *see id.* at 628-29 ("political party spending 'in cooperation, consultation, or concert with' a candidate does not fit within our description of 'contributions' in *Buckley*"). Courts "should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving . . . restrictions on political party spending."[8] *Id.* at 629.

As the Tenth Circuit held, "in the context of an election, a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties." *Colorado Republican*, 213 F.3d at 1227. Thus, in contrast to limits on individual or PAC contributions, which "bear 'more heavily on the associational right than on freedom to speak' " and which normally " 'entail[] only a marginal restriction' " on a contributor's speech, "a limit

8. These observations are well-taken. In *Buckley*, the Court upheld a $1000 limit on contributions by individuals and a $5000 limit on contributions by political committees, but it never had any occasion to address the application of these limits to political parties. *See Buckley*, 424 U.S. at 35-36, 58 n.66. Similarly, in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), the Court addressed limits on contributions made by individuals and PACs. The *Nixon* Court upheld Missouri's $1075 limit on individual and PAC contributions to candidates. *Nixon* did not address the issue in this case: limits on financial support provided by a political party to its candidates. In fact, the *Nixon* Court expressly recognized the important interests of an association, like a political party, in supporting its candidates: "an expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents,' " and, "thus[,] interfere[s] with the freedom of the adherents as well as the association." *Nixon*, 120 S. Ct. at 904 (*quoting Buckley*, 424 U.S. at 22).

upon the amount a [political] party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' upon the party's free speech." *Id.* (*quoting Nixon*, 120 S. Ct. at 904 and *Buckley*, 424 U.S. at 20).

Similarly, the Court of the Appeals for the Eighth Circuit also recognized that a political party speaks through its candidates and that limits on a party's support for its candidates, even if that support is labeled a contribution, impose substantial burdens on the party's speech. *Lamb*, 227 F.3d at 1072. The Eighth Circuit specifically found that "a [political] party's contribution . . . cannot properly be called a 'contribution' in the same sense [as] the individual contributions at stake in *Buckley*." *Id.* The First Amendment rights at stake in the context of party contribution limits are "different from, and weightier than, those that were involved in *Buckley*." *Id.*

The Eighth Circuit recognized that the *Buckley* Court upheld limits on an individual's contributions because these limits imposed " 'only a marginal restriction upon the contributor's ability to engage in free communication.' " *Id.* (*quoting Buckley*, 424 U.S. at 20-21). In *Buckley*, the Court found that an individual's " 'contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support' " and that a limit on such contributions " 'involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution.' " *Id.* (*quoting Buckley*, 424 U.S. at 21).

The considerations that supported individual contribution limits in *Buckley*, however, "simply do not carry the same force when the contributor is a political party." *Id.* As the Eighth Circuit held,

> The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While

> political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

Id.

Given "their unity of purpose, and the virtual identity of parties and their candidates,"[9] the Eighth Circuit found that "it is not easy to say, in the words of *Buckley* . . . that a political party's contribution 'does not communicate the underlying basis for the support.' " *Id.* (*quoting Buckley*, 424 U.S. at 21). Instead, "a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a 'contribution' in the same sense that the individual contributions at stake in *Buckley* were." *Id.* Moreover, "a party's contribution to its candidate, again in the words of *Buckley* [is not] merely a 'symbolic expression' of support; it is more like a substantive political statement than others' contributions are." *Id.* (*quoting Buckley*, 424 U.S. at 21). Thus, "the first amendment rights

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9. The Eighth Circuit recognized that "there is [not] always an exact one-to-one correspondence between candidates and their parties." *Lamb*, 227 F.3d at 1072. Nonetheless, it found that:

> [P]arties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard-bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Id.

at stake [in limits on political party contributions] are different from, and weightier than, those that were involved in *Buckley*." *Id.*

III. THE GOVERNMENT DID NOT CARRY ITS BURDEN OF DEMONSTRATING THAT PARTY FINANCIAL SUPPORT CAUSES ANY REAL PROBLEM

Given the Tenth Circuit's determination that the federal limits on coordinated expenditures constitute "a 'significant interference' with the First Amendment rights of political parties", *Colorado Republican,* 213 F.3d at 1232 (*quoting Buckley*, 424 U.S. at 25 and omitting internal quotation marks and citations), it could have applied strict scrutiny.[10] The Tenth Circuit, however, held that it was not necessary to resolve "definitively" the level of scrutiny. *Id.* at 1227. Even under *Nixon*'s "deferential" standard of scrutiny of "contribution" limits, the federal limits on political party coordinated expenditures violate the First Amendment.[11] *Id.*

In *Nixon*, as the Tenth Circuit explained, this Court held that

> [U]nder *Buckley's* standard of scrutiny, a contribution limit involving "significant interference" with associational rights could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though

10. The district court applied strict scrutiny. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1208 (D. Colo. 1999) ("the FEC must demonstrate that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored. FEC carries a heavy burden of proof.").

11. The Court decided that it could apply the *Nixon* standard of scrutiny of "contribution" limits because "the FECA treats coordinated expenditures as 'contributions.' " *Colorado Republican*, 213 F.3d at 1226-27 (citation omitted); *see* note 7 *supra*.

> the dollar amount of the limit need not be "fine tun[ed]."

Colorado Republican, 213 F.3d at 1227 (*quoting Nixon*, 120 S. Ct. at 904). The government, however, had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *Id.* at 1233 (footnote omitted). Moreover, limits on the amount of financial support provided by political parties to their candidates are not the most appropriate and direct means of preventing individuals from circumventing limits on their own contributions to candidates. *See id.* at 1233. Thus, the federal "limit on party spending is not 'closely drawn' to the recognized governmental interest but instead constitutes an 'unnecessary abridgment' of First Amendment freedoms." *Id.* (*quoting Buckley*, 424 U.S. at 25) (footnote omitted).

Just as the Tenth Circuit found that the government could not justify the federal limits on coordinated expenditures, the Eighth Circuit also found that Missouri, even under *Nixon*'s deferential level of scrutiny, could not justify limits on political party "contributions." *Lamb*, 227 F.3d at 1072-73.

A. The Government Must Demonstrate That Political Party "Expenditures" Or "Contributions" Cause Some Real Problem

It is well-settled that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Committee,* 470 U.S. 480, 496-97 (1985). It is equally well-settled that that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888 (2000). Thus, the Tenth Circuit correctly held that the government

"must show that political parties through their spending authority corrupt or appear to corrupt the political process." *Colorado Republican*, 213 F.3d at 1227.

The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon*, 120 S. Ct. at 907; *see City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1403 (2000) (Souter, J., concurring in part and dissenting in part) (same). Just as the Tenth Circuit required the government to justify limits on a political party's coordinated expenditures, this Court has required the government to demonstrate that there is a "real problem" when it regulates speech to protect children from exposure to indecent materials. *Playboy Entertainment Group*, 120 S. Ct. at 1891, 1893. The Court insisted that the government "must present more than anecdote and supposition." *Id.* at 1891. Similarly, even when government regulates commercial speech, it " 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 1888 (*quoting Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *see City of Erie v. Pap's A.M.*, 120 S. Ct. at 1403 (Souter, J., concurring in part and dissenting in part) ("application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue").

Nixon and *Buckley* do not excuse the government from its burden of showing that a political party's support for its candidates causes corruption or the appearance of corruption. In *Nixon*, the Court permitted the state to rely on *Buckley* for the proposition that a $1000 contribution made by an individual to a candidate may cause corruption or the appearance of corruption, and it excused the state from making any additional evidentiary showing. 120 S. Ct. at 906-08. *Buckley*, however, did not address any question about the validity of limits on the financial support provided by

a political party to its candidates. 424 U.S. at 58 n.66. Thus, *Nixon's* rejection of the state's duty to prove beyond *Buckley* that individual contributions cause corruption or the appearance of corruption simply does not address the separate, distinct question in this case: whether the financial support provided by a political party to its candidates causes either corruption or the appearance of corruption. Indeed, as the Tenth Circuit recognized, "[t]o encompass political parties within the *Buckley* language on corruption would require a real extension of this precedent," and "[s]uch an extension is not warranted by the Court's post-*Buckley* FECA jurisprudence and would betray the historic importance of political parties." *Colorado Republican*, 213 F.3d at 1232.

B. There Is No Showing That Party Support Causes Corruption Or The Appearance Of Corruption

The Tenth Circuit expressly found that the government had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *Id.* at 1233 (footnote omitted). The government now claims simply that "it is reasonable to assume that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office." Pet. Br. 23. The government is mistaken.

It is not "reasonable to assume" that a political party's coordinated expenditures (or contributions) are "like large campaign contributions generally." As the Courts of Appeals for both the Tenth and Eighth Circuit held, political party expenditures (or contributions) and individual contributions are not the same. *Colorado Republican*, 213 F.3d at 1227; *Lamb*, 227 F.3d at 1072. Moreover, limits on the amount of financial support provided by a political party to its candidate have "weightier effects" on First Amendment interests than limits on individual contributions. *Lamb*, 227 F.3d at 1072.

It is not "reasonable to assume" that a political party's influence over its candidates creates corruption or the appearance of corruption. Even if *Nixon* broadened the definition of corruption to include some amorphous notion of "improper influence", it does not follow that the effective use of party resources to induce party loyalty is in any sense "improper." *See* Pet. Br. 23. As, for example, Justice Thomas has noted, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Colorado I*, 518 U.S. at 646 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part).

Although the government asserts that the court of appeals "underestimate[d] the potential for abuse", Pet. Br. 24, it "must present more than anecdote and supposition" that political party expenditures or contributions cause corruption or the appearance of corruption. *Playboy Entertainment Group*, 120 S. Ct. at 1891. When vital First Amendment interests are significantly burdened, the government must demonstrate that there is a "real problem." *Id.* at 1891, 1893. The Court, of course, can only be confident that there is a "real problem" if the government presents some objective evidence. *See Microsoft Corporation v. United States*, 121 S. Ct. 25, 26 (2000) (Rehnquist, C.J.) (inquiry into the appearance of impartiality is "an objective one" and must be "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances"). Here, however, the government cannot point to any evidence that money "spent" by political parties for their candidates or money "contributed" by political parties to their candidates causes corruption. The government cannot point to any evidence even of an appearance of corruption.

Just as the government failed to demonstrate that a political party's coordinated expenditures cause corruption or the appearance of corruption, Missouri failed to demonstrate that a political party's "contributions" cause any "real problem."

The Eighth Circuit expressly recognized this Court's determination in *Nixon* that "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " 227 F.3d 1073 (*quoting Nixon*, 120 S. Ct. at 906). Here, however, the justification – "the threat that a political party will corrupt a candidate" – is "novel and not particularly plausible." *Id.* Missouri, in any event, had no evidence that a political party's "contributions" cause corruption or the appearance of corruption. *Id.* ("the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented").

C. Limits On A Political Party's Speech Are Not Closely Drawn To Prevent Circumvention Of Limits On An Individual's Contributions

The government argues that preventing circumvention of limits on individual contributions justifies limiting the size of a political party's coordinated expenditures or contributions. *See* Pet. Br. 25-32. This rationale fares no better than its anti-corruption rationale.

The Court, of course, has recognized that certain contribution limits work to protect the integrity of other contribution limits. In *Buckley*, for example, the Court upheld a $25,000 limit on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates.[12]

12. Individual members of the Court have also suggested that Congress could limit the amount of individual contributions *to* a political party. *Colorado Republican*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J); *California Medical Association v. FEC*, 453 U.S. 182, 197-99 (1981) (plurality opinion) (risk of evasion of limits on contributions to candidates justified limit on contributions *to* political action committees).

Buckley, 424 U.S. at 38. *Buckley*, however, does not provide any authority for limiting the size of contributions or coordinated expenditures made *by* political parties to their candidates.

As the Eighth Circuit has explained, *Buckley* "upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate."[13] *Lamb*, 227 F.3d at 1073 (*citing Buckley*, 424 U.S. at 38). In the case of both Missouri's "contribution" limit and the federal limit on coordinated expenditures, "the challenged restriction is on the party's giving, and the [government] seek[s] to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving." *Id.* As the Eighth Circuit held, imposing "burdens [on] the free speech rights of political parties in order to control the activities of someone else [an individual contributor]" is "something quite different from what *Buckley* approved." *Id.*

Buckley at most supports the government's power to limit individual contributions *to* a political party as a means of preventing evasion of limits on individual contributions to candidates. Although there is some very limited authority upholding limits on "contributions" made *by* a political party,[14] the Court has never held, much less even suggested,

13. *Buckley* upheld "an overall $25,000 limitation on total contributions by an individual during any calendar year" because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38.

14. The Alaska Supreme Court upheld $5000 to $100,000 limits on political party "contributions" to candidates, but it did so in a very cursory fashion. *Alaska v. Alaska Civil Liberties Union*, 978 (Cont'd)

that limits on the financial support provided *by* a political party to its candidates are a constitutionally valid means of preventing evasion of a limit on individual contributions. In fact, quite to the contrary, when Justice Breyer suggested the possibility of limits on contributions *to* a political party as a means of preventing evasion of individual contribution limits, he also recognized that limits on spending by a political party would impose a "markedly greater burden."[15] *Colorado I*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J.) (internal quotation marks and citation omitted).

Even if, as the government suggests, some individuals attempt to circumvent limits on individual contributions to candidates by making contributions to political parties that are "tallied" or "earmarked" for particular candidates (Pet. Br. 26-31), there is no reason to limit political parties' freedom of speech. As both the Tenth and Eighth Circuit recognized, there are more appropriate and direct – that is –

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P.2d 597, 625-26 (1999), *cert. denied,* 120 S. Ct. 1156 (2000). Two federal district courts have also considered state law limits on political party contributions to their candidates. One court upheld Colorado's $10,000 to $400,000 limits on political parties' "contributions" to candidates, *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F. Supp. 2d 1066, 1093-97 (D. Colo. 1999), but the Colorado legislature subsequently repealed these limits. 2000 Colo. Legis. Serv. Ch. 36, § 12 (H.B. 1194, Mar. 15, 2000) (West). Although the other court approved limits on party contributions to candidates in principle, it held that the particular $200, $300, and $400 limits were "too low to pass constitutional muster." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 484-87 (D. Vt. 2000).

15. Limits on the total amount that an individual can contribute *to* a political party may reduce the total amount of the financial resources available to the party; limits on coordinated expenditures or contributions restrict the party's ability to target these limited resources to candidates whose electoral success is necessary for the party to achieve its goal of taking control of government.

more "closely drawn" – means of preventing individuals from circumventing limits on their own contributions to candidates. *See Colorado Republican*, 213 F.3d at 1232; *Lamb*, 227 F.3d at 1073.

Both federal law and state law "already have a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Lamb*, 227 F.3d at 1073. As the Tenth Circuit explained, under federal law and regulations, individual contributions that are in any way "earmarked" for a particular federal candidate are subject to the limit on individual contributions to that candidate. *Colorado Republican*, 213 F.3d at 1232. Similarly, as the Eighth Circuit explained, "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum" and any such "earmarked" contribution would be subject to the limits on individual contributions. *Lamb*, 227 F.3d at 1073. Thus, as the Tenth Circuit held, "[v]igilant enforcement" of the limits on individual contributions, "rather than a severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of . . . individual contribution limits."[16] *Colorado Republican*, 213 F.3d at 1232.

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16. The government, nonetheless, suggests that "the earmarking provision [of federal law] does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on [individual] contributions to candidates." Pet. Br. 29. This suggestion is not well-taken. The government has not made any showing either that it has tried to enforce the earmarking provisions or that enforcement has not been effective. *See Playboy Entertainment Group*, 120 S. Ct. at 1888 ("[w]hen a plausible, less restrictive alternative is offered to a content-based restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals").

(Cont'd)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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As the Eighth Circuit recognized, "[l]imitations on party spending might have an indirect attenuating effect on secret 'earmarking' agreements between individuals and political parties because such agreements may be hard to detect and police directly." *Lamb*, 227 F.3d 1073. Absent any showing that efforts to enforce limits on individual contributions have been ineffective, this rationale, however, is "too frail . . . to justify burdening the substantial free speech rights of political parties" that are jeopardized by limits on contributions to their candidates. *Id.*